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Supreme Court of the United States

OCTOBER TERM, 1960

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1960

No.

KINOSHITA & CO., LTD., TOKYO,
Petitioner,

v.

LIBERTY NAVIGATION & TRADING CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 14, 1960 (App. 19).* The judgment modified in part and affirmed a judgment of the United States District Court for the Southern District of New York (A. 3a).*

The action is at law by Liberty Navigation & Trading Co., Inc., owner of the SS. JOSEFINA, to recover damages for a total breach of a voyage charter party for transportation of a full cargo of sugar from the Philip-

* "App." refers to the appendix to this petition, being the majority and dissenting opinion of the Court below. The letter "A" is used to designate "Appellant's Appendix" (yellow cover) filed in the Court below, being part of the record in the United States District Court.

pines to Korea which petitioner cancelled because the Philippine Government placed an embargo upon the export of sugar to any country other than the United States. Petitioner conceded liability, thus leaving only the issue of damages.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (App. 1) and the dissenting opinion of Lumbard, C. J. (App. 12), are reported at 285 F. 2d 343. The opinion of the District Court (A. 3a) is reported in 178 F. Supp. 729.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 14, 1960. Rehearing was denied by order dated February 2, 1961. (A. 164a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. The first question presented is the measure of damages to be applied in an action by a vessel owner for a total breach of a charter party where it is cancelled prior to any act of performance or expense by the owner. Particularly whether an owner may recover not only his prospective profit but in addition operating expenses incurred after repudiation as would have been incurred if the vessel remained idle in port during the period of the charter, although the vessel in fact was engaged in other employment.

2. The second question presented is, assuming the damages are to be determined as if the vessel were idle in port

for the period of the charter, whether they should be limited by the provision in the cancelled charter providing that demurrage for delays in excess of the agreed laydays for loading and discharge is payable at the rate of $1000 per day.

3. The third question presented is whether the charterer is entitled to an allowance or credit by reason of the fact that had the charter been performed the vessel would have ended up in Korea and be required to sail in ballast since there were no outbound cargoes available in Korea, and as a consequence the vessel was left in a more favorable position by cancellation and the opportunity to make a substitute voyage to the United States.

Statement

On May 17, 1957, the petitioner chartered the SS. JOSEFINA, to load a full cargo of sugar in the Philippines on or about July 10, 1957, for transportation to Korea. At that time, the vessel was in the Far East and was already committed to make a voyage to Japan. No mention was then made of any special consequences that would result from non-performance. About a month before the date of performance, the Philippine Government suspended the issuance of export licenses for sugar to Korea, and accordingly the petitioner cancelled the charter party. The vessel owner thereupon notified petitioner that it would seek other employment for the vessel and hold the petitioner liable for its damages.

The owner subsequently rechartered the vessel for a voyage from the Philippines to the United States, with knowledge that it would result in a loss. However, the evidence indicated that it was made to return the vessel to the United States by October, when her crew's articles expired. The voyage to the United States took 82 days,

whereas the cancelled voyage to Korea would have taken 38½ days including time for loading and discharge of the cargo.

The gross freight payable under the broken charter was $121,740 and the total cost of performance was $86,784.50. Thus, the net profit that would have been earned was $34,955.50. This profit figure, however, does not take into consideration the fact that had the subject charter been performed the vessel would have ended up in Korea and forced to return in ballast at considerable expense because, as established by the record, there were no outbound cargoes for that vessel in Korea.

The United States Court of Appeals for the Second Circuit modified the judgment of the District Court and awarded damages of $73,635.68. This was more than double the amount that the vessel owner would have earned in performing the cancelled charter. This result was reached upon the following hypothesis, namely, that if the vessel were idle in port during the 38½ day period required to perform the cancelled charter, instead of undertaking a loss charter to the United States, the owner would not have saved the operating cost of the vessel for that period, such as crew's wages, provisions, etc., and thus would be entitled to such expense in addition to the prospective profit of the cancelled charter. This hypothesis was based in turn upon a further assumption that the operating cost of a vessel other than fuel and port charges is in the nature of overhead and is no less when idle in port than while performing a chartered voyage. Although the parties stipulated what would be the daily operating cost of the vessel in performing the cancelled voyage, there was no evidence as to what expense would be incurred if the vessel were idle in port.

Chief Judge Lumbard wrote a dissenting opinion, to which reference will be made.

Reasons for Granting the Writ

This decision of the Court of Appeals is in conflict with prior decisions of this Court as well as with decisions of other circuits and of the Second Circuit itself, and has thus unsettled established rules historically applied in determining damages not only for a total breach of a maritime contract but of other contracts generally.

I

The decision below permitting a vessel owner in an action for a total breach of a charter to recover not only the prospective profits but also operating expenses of the vessel after repudiation and acceptance thereof, conflicts with decisions of this Court and other circuits. It is a radical innovation in determining damages for a total breach of a contract where nothing has been done or expended toward performance and therefore should be reviewed and rejected by this Court.

The Court below, in its opinion from which Chief Judge Lumbard dissented, agreed that the case presented an interesting question of law. The basic conflict between this decision and the decisions of this Court and other circuits is made quite clear by a brief recapitulation of the essential facts as found by the Court below and the nature of the decision.

The Essential Facts

(a) The subject charter was cancelled before the vessel was scheduled to proceed to the port designated in the